

REDACTED DECISION -- 05-648 MFE & 05-649 MFE -- BY ROBERT W. KIEFER, JR., ALJ -- SUBMITTED for DECISION on SEPTEMBER 28, 2006 -- ISSUED on MARCH 27, 2007

SYNOPSIS

MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against her is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- A taxpayer is liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f) [2004] if it transports motor fuel in the State of West Virginia with a shipping document that does not contain all of the information prescribed by W. Va. Code § 11-14C-34(a) & (b) [2004].

MOTOR FUEL EXCISE TAX -- BURDEN OF PROOF -- A taxpayer fails to meet its burden of showing that it is not liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f) [2004] if it fails to show that it was transporting motor fuel in the State of West Virginia with a shipping document that contained all of the information required by W. Va. Code § 11-14C-34(a) & (b) [2004].

FINAL DECISION

On or about December 6, 2005, two criminal investigators employed by the Criminal Investigation Division of the State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued two separate assessments against the Petitioner. Each of the two assessments was issued against the Petitioner for allegedly failing to carry a shipping document, in violation of W. Va. Code § 11-14C-34 [2004]. The first assessment, in the amount of \$, was issued pursuant to W. Va. Code § 11-14C-34(f)(3) [2004] for a first violation thereof. The second assessment, in the amount of \$, was issued pursuant to W. Va. Code § 11-14C-34(f)(4) [2004] for a second violation thereof. Written notice of these assessments was provided to the Petitioner's drivers that day.

Thereafter, on December 7, 2005, and received on December 13, 2005, in the offices of this tribunal, the West Virginia Office of Tax Appeals, the Petitioner timely filed two petitions for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. On December 6, 2005, the Respondent State Tax Commissioner's witness was employed by the Respondent's Motor Fuels "Division."

2. On that day, the Respondent's witness and his partner, _____, were checking transporters of motor fuels at the southbound weigh station on Interstate__ in ____ County, to ensure that the transporters were in compliance with the West Virginia motor fuel excise tax statute.

3. In performing their duty, these two investigators primarily inspected shipping documents in the possession of transporters.

4. One inspector issued the first assessment against the Petitioner to one of its drivers. *See* State's Exhibit No. 1.

5. This inspector issued the assessment for failure to carry a shipping document. *See* State's Exhibit Number 1.

6. The Respondent's witness testified that "we" were handed a shipping document by the driver of the first of the Petitioner's vehicles that was stopped. *See* State's Exhibit Number 2.

7. The document was headed "Shipping Paper," and showed that the first vehicle assessed was transporting "Hi Sulfur Diesel." *See* State's Exhibit No. 2.

8. The Respondent's witness testified that the shipping document carried by the Petitioner's driver was "very lacking" in information that is required to be set out on a shipping document.

9. Because this was a first offense, the Respondent's witness' partner, the other investigator, issued an assessment in the amount of \$.

10. The Respondent's witness issued a second assessment to the Petitioner on the same day, approximately ten to fifteen minutes later. *See* State's Exhibit No. 3.

11. The second assessment was issued to another of Petitioner's drivers, who was driving a second vehicle.

12. Because it was deemed by the Respondent's witness to be a second offense, the second assessment was for \$. *See* State's Exhibit No. 3.

13. The Respondent's witness testified that the Petitioner's driver presented him with "an identical shipping document" to that presented by the driver of the first vehicle, except that that the number of gallons shown on the shipping document was different.

14. As applicable to the Petitioner, the Respondent's witness testified that the following items are required to be set out on the shipping document:

1. The identification, including address, of the terminal or bulk plant from which the motor fuel was received;
2. The date the motor fuel was loaded;
3. Invoiced gallons loaded;
4. The destination state of the motor fuel; and
5. If the document is issued by a terminal operator, the invoiced gallons loaded and a statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

15. The Petitioner's witness, _____, testified that since the inception of the current motor fuel excise tax statute in 2003, the Petitioner uses its "meter tickets" as its shipping documents. *See* Petitioner's Exhibit No. 1, page 2 and Petitioner's Exhibit No. 2.

16. The Petitioner's witness testified that she believed the Petitioner's meter tickets, Petitioner's Exhibit No. 1, page 2 and Petitioner's Exhibit No. 2, were machine-generated shipping documents that satisfied the requirements of the motor fuel excise tax statute.

17. The Petitioner's witness testified that both vehicles were carrying meter tickets at the time that they were stopped.

18. The Respondent's witness recalls that he was shown the first sheet of Petitioner's Exhibit No. 1. However, he does not recall whether or not he was shown the second page of Petitioner's Exhibit No. 1. However, he testified that it was "very possible" that he was shown the second page of Petitioner's Exhibit No. 1.

19. The Petitioner's witness presented Petitioner's Exhibit No. 3 as an example of what the Petitioner believed to be a shipping document that was not machine generated and, therefore, did not satisfy the motor fuel excise tax statute.

20. The Respondent's witness testified that, absent a waiver issued by the State Tax Commissioner, the Petitioner's meter tickets were considered incomplete because they are required to be machine generated, and because they were not numbered and did not show where the trucks were loaded.

21. Effective December 6, 2005, following receipt of the two assessments, the Petitioner obtained a waiver from the State Tax Commissioner.

22. The Respondent's witness testified that he does not consider Petitioner's Exhibits Nos. 1 and 2 to be shipping documents because they do not contain all of the information required by statute.

23. The Respondent's witness testified that he considers Petitioner's Exhibits Nos. 1 and 2 to be incomplete shipping documents.

24. The Respondent's witness testified that he would consider Petitioner's Exhibits Nos. 1 and 2 to be shipping documents if they contained all of the information required by statute.

25. At the hearing, the Respondent presented a notice that was sent to "all" taxpayers who are subject to the motor fuel excise tax. *See* State's Exhibit No. 4.

26. The Petitioner's witness testified that she received the notice respecting compliance with the motor fuel excise tax, State's Exhibit No. 4.

27. The Petitioner's witness testified that she believed the Petitioner to be in compliance with the requirements set out in State's Exhibit No. 4.

28. The Petitioner's witness testified that the Petitioner was attempting to comply with the motor fuel excise tax law, and that it believed that it was in compliance.

29. The Petitioner's witness testified that as soon as she discovered that the State Tax Commissioner believed that the Petitioner was not complying with the law, that is, upon issuance of the assessments that are the subject of this controversy, the Petitioner undertook to obtain a waiver from the Respondent State Tax Commissioner and to rectify certain deficiencies in their shipping documents, so as to comply with the State Tax Commissioner's construction of the statute.

30. The Petitioner's witness testified that the Petitioner objects to the fact that it was assessed twice in the period of approximately 15 minutes, because doing so deprived it of the opportunity to take corrective action following the first assessment.

31. The Petitioner's witness testified that the Petitioner is presently using the documents of the form contained in Petitioner's Exhibit No. 1 as its shipping documents.

32. The Petitioner's witness testified that the information on the first page of Petitioner's Exhibit No. 1 that is handwritten is still handwritten, but that it is now acceptable because it is done pursuant to a waiver issued by the Respondent State Tax Commissioner.

33. The Petitioner's witness testified that with respect to the second page of Petitioner's Exhibit No. 1, for some trucks the information that is handwritten is still handwritten, but with other trucks the information that was formerly handwritten is now machine generated by handheld meters.

DISCUSSION

The first issue is whether the Petitioner violated the provisions of W. Va. Code 11-14C-34 [2004]. W. Va. Code 11-14C-34 [2004] provides, in relevant part (all emphases added):

(a) *A person shall not transport in this state any motor fuel by barge, watercraft, railroad tank car or transport vehicle unless the person has a **machine-generated shipping document**, including applicable multiple copies thereof, for the motor fuel that complies with this section:* Provided, That in the event a terminal operator or operator of a bulk plant does not have installed on the first day of January, two thousand four, an automated machine that will print machine-generated shipping documents, the commissioner may authorize the terminal operator or operator of a bulk plant to issue manually prepared shipping documents: Provided, however, That in the event of an extraordinary unforeseen circumstance, including an act of God, that temporarily interferes with the ability to issue an automated machine-generated shipping document, a manually prepared shipping document that contains all of the information required by subsection (b) of this section shall be substituted for the machine-generated shipping document. A terminal operator or operator of a bulk plant shall give a shipping document to the person who operates the barge, watercraft, railroad tank

car or transport vehicle into which motor fuel is loaded at the terminal rack or bulk plant rack.

(b) *The shipping document* issued by the terminal operator or operator of a bulk plant *shall contain the following information* and any other information required by the commissioner:

(1) *Identification, including address, of the terminal or bulk plant from which the motor fuel was received;*

(2) *Date the motor fuel was loaded;*

(3) *Invoiced gallons loaded;*

(4) *Destination state of the motor fuel* as represented by the purchaser of the motor fuel or the purchaser's agent;

(5) In the case of aviation jet fuel, the shipping document shall be marked with the phrase "Aviation Jet Fuel, Not for On-road Use" or a similar phrase;

(6) *In the case of dyed diesel fuel, the shipping document shall be marked with the phrase "Dyed Diesel Fuel, Nontaxable Use Only, Penalty for Taxable Use" or a similar phrase; and*

(7) If the document is issued by a terminal operator, the invoiced gallons loaded and a statement indicating the name of the supplier that is responsible for the tax due on the motor fuel.

(c) A terminal operator or bulk plant operator may rely on the representation made by the purchaser of motor fuel or the purchaser's agent concerning the destination state of the motor fuel. In the event that either the terminal operator, bulk plant operator, purchaser or transporter determines prior to the shipment of motor fuel leaving the terminal or bulk plant that the destination state indicated on the shipping document is incorrect, the diversion procedure provided in subdivision (3), subsection (d) of this section shall be used to obtain authorization to deliver the motor fuel to a different state. A purchaser is liable for any tax due as a result of the purchaser's diversion of motor fuel from the represented destination state.

(d) *A person to whom a shipping document was issued shall:*

(1) *Carry the shipping document in the means of conveyance for which it was issued when transporting the motor fuel described;*

(2) *Show the shipping document upon request to any law-enforcement officer, representative of the commissioner and any other authorized individual when transporting the motor fuel described;*

(3) *Deliver motor fuel to the destination state printed on the shipping document unless the person:*

(A) *Notifies the commissioner before transporting the motor fuel into a state other than the printed destination state that the person has received instructions after the shipping document was issued to deliver the motor fuel to a different destination state;*

(B) *Receives from the commissioner a confirmation number authorizing the diversion; and*

(C) *Writes on the shipping document the change in destination state and the confirmation number for the diversion; and*

(4) *Gives [sic] a copy of the shipping document to the person to whom the motor fuel is delivered.*

* * * *

(f) *Any person who transports motor fuel in a barge, watercraft, railroad tank car or transport vehicle **without a shipping document or with a false or an incomplete shipping document**, or delivers motor fuel to a destination state other than the destination state shown on the shipping document, is subject to the following civil penalty.*

(1) *If the motor fuel is transported in a barge, watercraft or transport vehicle, the civil penalty shall be payable by the person in whose name the means of conveyance is registered.*

(2) *If the motor fuel is transported in a railroad tank car, the civil penalty shall be payable by the person responsible for shipping the motor fuel in the railroad tank car.*

(3) *The amount of the civil penalty for a first violation is five thousand dollars.*

(4) *The amount of the civil penalty for each subsequent violation is ten thousand dollars.*

(5) *Civil penalties prescribed under this section are assessed, collected and paid in the same manner as the motor fuel excise tax imposed by this article.*

West Virginia Code § 11-14C-34(f) [2004] provides four statutory violations which may result in the imposition of a civil penalty:

- (1) Transporting motor fuel without a shipping document;
- (2) Transporting motor fuel with a false shipping document;
- (3) Transporting motor fuel with an incomplete shipping document; or
- (4) Delivering motor fuel to a destination state other than the destination state shown in the shipping document.

The first assessment issued against the Petitioner was for its “FAILURE TO CARRY SHIPPING DOCUMENT.” The second assessment was for its “Failure to Carry Shipping Document (2nd Offense).” Both assessments cited “W. Va. Code § 11-14C-34(F)” [sic].

The Respondent State Tax Commissioner’s witness testified that the assessments were issued because he and his partner believed the documents did not satisfy the statutory requirements, not because the Petitioner’s drivers did not present documents. The Respondent Commissioner’s witness admits that each of the Petitioner’s drivers presented, at a minimum, a document to the Commissioner’s representatives, specifically State’s Exhibit No. 2 and Petitioner’s Exhibit No. 1, page 1. However, because the documents did not contain all of the information required by the Code, and because some information required by the Code was not machine generated, in the eyes of the Tax Commissioner’s witness the documents presented were not shipping documents.¹ Consequently, the Tax Commissioner’s representatives were of the opinion that the Petitioner was transporting fuel without shipping documents, and issued the assessments on this basis. However, the Respondent State Tax Commissioner is incorrect that the Petitioner was transporting motor fuel without shipping documents.

¹ Although the State Tax Commissioner’s witness testified that the shipping document is required to be numbered, this requirement does not appear in the Code or in the Tax Commissioner’s notice. *See* State’s Exhibit No. 4. However, even if it appeared in the notice, it would constitute inadequate grounds on which to issue an assessment.

Considering the evidence presented by the Respondent State Tax Commissioner's witness, his representatives were handed documents that purported to be shipping documents. The first was labeled "Shipping Paper." *See* State's Exhibit No. 2. The second was clearly intended to be a shipping document, and the Tax Commissioner's witness treated it as such. *See* Petitioner's Exhibit No. 1, page 1. The State Tax Commissioner's witness is correct that these documents did not contain all of the information required by the Code, and that at a portion of the required information that they contain was not machine generated. However, the Tax Commissioner's representatives treated them as shipping documents. Thus, the Petitioner was not transporting fuel without shipping documents.

W. Va. Code § 11-14C-34(f) [2004] provides that not carrying a shipping document constitutes one violation of that subsection, while carrying an incomplete shipping document constitutes a separate violation under the same subsection. A shipping document that does not contain all of the information required by the Code is still a shipping document. It is incomplete. A transporter carrying an incomplete shipping document cannot properly be said not to be carrying a shipping document. Similarly, a transporter carrying no shipping document at all is not carrying an incomplete shipping document. At worst, in this matter the Petitioner's drivers presented incomplete shipping documents.

The Petitioner takes the position that its meter tickets are its shipping documents. Its witness/representative maintains that the meter tickets were carried by its drivers. She also maintains that they should have been shown to the Tax Commissioner's representatives. However, there is no evidence in the record to show that they were, in fact, presented to the State Tax Commissioner's representatives.

Assuming that the meter tickets had been presented to the Tax Commissioner's representatives, at worst they would be considered incomplete shipping documents.

Petitioner's Exhibit No. 1, page 2, satisfies the requirements of W. Va. Code § 11-14C-34(b) and the April 12, 2004 notice issued by the State Tax Commissioner. *See* State's Exhibit No. 4. It contains the Petitioner's preprinted name and address, presumably the terminal or bulk plant from which the motor fuel was received. The date that the fuel was loaded, December 5, 2005 (05-Dec-05), is machine printed on the meter ticket. While the invoiced gallons loaded is handwritten on the meter ticket and, it is also printed or stamped on the ticket, although not printed on the ticket in the same manner as other information (i.e. it is machine generated).² The destination state of the motor fuel is listed on the meter ticket ("[specifically named destination]").³ The shipping document also contains the machine printed statement "THIS PRODUCT IS DYED DIESEL FUEL. NONTAXABLE USE ONLY. PENALTY FOR TAXABLE USE. OFF HIGHWAY/NOT LEGAL FOR MOTOR VEHICLE USE." This language is consistent with W. Va. Code § 11-14C-34(a) [2004] and the April 12, 2004 notice issued by the State Tax Commissioner. This meter ticket completely satisfies W. Va. Code § 11-14C-34(b) [2004] and the April 12, 2004 notice issued by the State Tax Commissioner.

Petitioner's Exhibit No. 2, satisfies the requirements of W. Va. Code § 11-14C-34(b) [2004] and the April 12, 2004 notice issued by the State Tax Commissioner in all but one respect. *See* State's Exhibit No. 4. It contains the Petitioner's preprinted name and address, which is presumably the terminal or bulk plant from which the motor fuel was received. The

² It may not be machine generated in the manner that the State Tax Commissioner's representatives expect. However, because it is machine generated, it complies with the strict letter of the law.

³ It appears that the original destination was [a specifically named destination] in West Virginia. The words "[one specifically named destination]" were scratched out and the word "[another specifically named destination]" was written in. In either case, the destination state was West Virginia, and the destination state was machine printed on the meter ticket.

date that the fuel was purportedly loaded, October 25, 2005 (25-Oct-05), is machine-printed on the meter ticket.⁴ As with the other meter ticket, the invoiced gallons loaded is handwritten on the meter ticket and also machine printed or stamped on the ticket in the same manner as Petitioner's Exhibit No. 1, page 2. A thorough examination of the meter ticket does not disclose a destination state ("[j]ust a specifically named location]").⁵ The shipping document also contains the machine printed statement "THIS PRODUCT IS DYED DIESEL FUEL, NONTAXABLE USE ONLY. PENALTY FOR TAXABLE USE. OFF HIGHWAY/NOT LEGAL FOR MOTOR VEHICLE USE." This language is consistent with W. Va. Code § 11-14C-34(a) [2004] and the April 12, 2004 notice issued by the State Tax Commissioner. This meter ticket satisfies four of the five requirements of W. Va. Code § 11-14C-34(b) [2004] and the April 12, 2004 notice issued by the State Tax Commissioner. It is deficient only in that it fails to show the destination state. As such, the meter ticket is, at worst, an incomplete shipping document.

As stated above, the Petitioner maintains that its meter tickets are its shipping documents. The problem with the meter tickets is that there is no direct or reliable circumstantial evidence in the record to show that the Petitioner's drivers presented the meter tickets to the Tax Commissioner's representatives. Neither of the Petitioner's drivers was present to testify that the meter tickets were presented to the Commissioner's representatives. The Tax Commissioner's witness testified that they may have been presented, but that he had no specific recollection that they were presented at the scene. The administrative law judge finds the testimony of the State Tax Commissioner's representative credible in this respect. In the absence of some direct or

⁴ It seems unlikely that the fuel was loaded on October 25, 2005 for delivery on December 6, 2005. However, there is no evidence in the record to show that it was not loaded on October 25. It is likely and that said date is a typographical or some other form of clerical error.

⁵ The words "Store Dump" were scratched out. Testimony presented at the hearing discloses that the destination state was West Virginia.

reliable circumstantial evidence to show that the meter tickets were presented to the Commissioner's representatives, it cannot be said that they were presented. The burden of proof is on the Petitioner to show that the meter tickers were presented to the State Tax Commissioner's representatives. W. Va. Code § 11-10A-10(e) [2002]. The Petitioner has not satisfied its burden in this matter.

In the absence of evidence that the meter tickets were presented to the Commissioner's representatives, it must be held that the Petitioner presented two incomplete shipping documents. *See* State's Exhibit No. 2 and Petitioner's Exhibit No. 1, page 2. Thus, there are two separate violations of W. Va. Code § 11-14C-34(f) 2004], which provide a basis for the two assessments issued against the Petitioner.⁶

The Petitioner expresses concern with the fact that it received two assessments within ten to fifteen minutes for the same statutory violation. It complains that it believed it was complying with the statute. When it received its first assessment, in effect putting it on notice that it was not complying with the statute, it did not have the opportunity to take steps to correct its deficiencies before being issued a second assessment.

This Office is not unmindful of the Petitioner's concern. However, the Petitioner has committed two separate violations of the statute. The Tax Commissioner has chosen to enforce the strict letter of the law. Stated differently, the Tax Commissioner has chosen not to exercise any discretion to give the Petitioner an opportunity to take corrective activity before issuing a second assessment.⁷ The statute in this matter gives this Office no authority to waive, abate or

⁶ If the Petitioner had proven that the meter tickets were presented to the Commissioner's representatives, there would only be one valid assessment for presentation of an incomplete shipping document, since Petitioner's Exhibit No. 1, page 2 is a complete shipping document.

⁷ Upon issuance of the assessments in this matter, the Petitioner acted as promptly as it possibly could to correct the deficiencies in its operations.

reduce the civil penalty. Since the Tax Commissioner has chosen to enforce the strict letter of the law, and since a statutory violation has been proven, this Office must affirm the civil penalty.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner is liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f) [2004] because it transported motor fuel in the State of West Virginia with a shipping document that did not contain all of the information prescribed by W. Va. Code § 11-14C-34(a) & (b) [2004].

3. The Petitioner failed to meet its burden of showing that it is not liable for the civil penalty provided for by W. Va. Code § 11-14C-34(f) [2004] because it failed to show that it was transporting motor fuel in the State of West Virginia with a shipping document that contained all of the information required by W. Va. Code § 11-14C-34(a) & (b) [2004].

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the two motor fuel excise tax money penalty assessments issued against the Petitioner for two separate violations of W. Va. Code § 11-14C-34(f) [2004] occurring on December 5, 2005, in the total amount of \$, should be and are hereby **AFFIRMED**.